United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1043

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH CALA,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1043

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH CALA,
Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

On September 5, 1973, a two-count indictment was returned to the court charging Joseph Cala with violating the counterfeiting laws and conspiring to do so.[1] The first count charged the defendant with conspiring with one James Gambacorta, named as a co-conspirator but not a co-defendant, to violate Title 18, United States Code, Section 473 between approximately July and August, 1972, a time subsequently limited by the Government's Bill of Particulars to August 3, 1972. In the second count he was charged with transferring counterfeit currency in violation of Title 18, United States Code, Section 473.

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[1] Counsel for the appellant, apparently by inadvertence, included in the Appendix the California indictment upon which this appellant was acquitted; therefore, the indictment under which he stands convicted is appended hereto and marked Appendix 1.

In September, 1972, Cala was indicted in the United States District Court for the Central District of California on a charge of possessing counterfeit currency in California on or about August 9, 1972 in violation of Title 18, United States Code, Section 472. On January 3, 1973, the jury returned a general verdict of not guilty following a two day trial.

Samuel Lipson, Cala's trial counsel there, represented the defendant on the instant indictment until about April 17, 1974, when Samuel Perla was substituted as trial counsel. Then, on July 22, 1974 the case was placed on the trial calendar. On September 30, 1974, the parties were notified that the matter would be tried before the Honorable Lloyd F. MacMahon, United States District Court Judge, sometime between November 1 and November 14, 1974.

Trial commenced on November 11, 1974 and concluded the following day with a guilty verdict on the conspiracy count and a not guilty verdict on the substantive count. Though trial counsel did not move to dismiss the indictment on the ground of double jeopardy or collateral estoppel prior to trial even though he was aware of the California acquittal for a period of time (51)[2] he did move to dismiss on that ground at the time of trial (47, 49, 52-53). The court reserved decision on that motion as well as a motion to dismiss for failure of proof at the conclusion of the government's case (80) and again after the defendant rested (81).

Subsequent to trial, both counsel filed briefs with the court as directed on the question of double jeopardy and/or collateral estoppel. On January 9, 1975 the court filed its memorandum opinion denying the defendant's motion to

[2] Reference to trial transcript.

dismiss the indictment and for judgment of acquittal.[3] Cala was then sentenced to the custody of the Attorney General for a period of two years and on that same day he filed a Notice of Appeal.

Statement of Facts

The government's case was based upon the testimony of James Gambacorta, the unindicted co-conspirator. He testified that he first met Joseph Cala in a restaurant in Tonawanda, New York, known as Giovanni's Den about the end of May, 1972 (13). That restaurant was owned by Cala's brother, John (30-31). Between that time and mid-July, 1972, Gambacorta and Cala met there on several occasions (13-14, 16, 18-19). During the course of one of their first conversations, Cala mentioned to Gambacorta that he was in the importing business in California (14). Gambacorta then told him that he was in possession of approximately $200,000 in counterfeit $10 bills (12) and asked Cala if he could obtain any paper suitable for the printing of counterfeit. Cala said he would see what he could do (14).

Then, sometime after July 4, 1972, during the course of a further meeting and discussion between the two, Gambacorta gave Cala a sample $10 bill (16). About July 11, 1972 the two again met at that restaurant. There, Gambacorta exhibited some additional samples; Cala looked at them and told him that the printing was good but the paper was of poor quality (18). Cala then asked Gambacorta to give him all the counterfeit money so that he could take it to California and attempt to dispose of it,

[3] Judge MacMahon's Memorandum Decision appended hereto and marked Appendix II.

stating to Gambacorta that if he was successful he would share the proceeds with Gambacorta (18-19). Gambacorta then returned to the restaurant around the middle of July, 1972 and delivered a brown suitcase to Cala containing what he estimated to be approximately $200,000 in counterfeit $10 bills (19). Sometime thereafter Cala departed for California. From there, Cala placed several collect telephone calls to Gambacorta in Buffalo, New York between July 29 and August 3, 1972 to discuss the counterfeit currency (20-21, 60-62).

On August 9, 1972, Cala was arrested in possession of approximately $160,000 in $10 counterfeit bills by Secret Service Agent James Delamore (66-67). Delamore testified that, in his opinion, the bills he seized were counterfeit (72).

ARGUMENT

POINT I

The defendant was not placed in double jeopardy by being tried on the New York indictment.

For purposes of determining double jeopardy, offenses are not the same simply because they arise out of the same general course of criminal conduct. They are only the same when evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. *Gavieres v. United States,* 220 U.S. 338 (1911); *United States v. Kramer,* 289 F.2d 909 (2nd Cir. 1961); *United States v. McCall,* 489 F.2d 359 (2nd Cir. 1973).

Here, the gist of the first count of the New York indictment was an agreement between the defendant and James Gambacorta. The Bill of Particulars and the proof at trial show that that unlawful agreement existed on and between about July 4, 1972 and August 2, 1972. The California indictment charged possession of the same counterfeit currency on August 9, 1972. The unlawful agreement was not an element required to be proved to convict the defendant upon that substantive charge; nor was it, in fact, a part of the proof in the California trial. Judge MacMahon so found.[4]

Indeed, at the time of the California trial, the facts of the conspiracy were not known, occasioned by the fact that the co-conspirator, James Gambacorta, was not arrested until January 11, 1973 (A-9) and did not confess to the conspiracy until August 8, 1973 (A-15), more than eight months after the defendant was acquitted in California.

Thus, the trial of the defendant on this indictment did not place him in double jeopardy by virtue of his prior acquittal on the California indictment. Whether or not any of the issues necessarily determined during the course of the defendant's California trial would prevent the defendant's conviction here is, of course, another matter.

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[4] See pp. 4 and 5 of Judge MacMahon's Memorandum Decision appended hereto.

POINT II

The principle of *res judicata* or "collateral estoppel" does not bar defendant's conviction of the conspiracy charge.

It is clear that the double jeopardy clause of the Fifth Amendment includes the principle of collateral estoppel which would prevent a defendant in a criminal case from being convicted on the basis of an issue of ultimate fact which had been determined in his favor in a prior criminal proceeding involving the same parties. *Ashe v. Swenson,* 397 U.S. 436 (1970); *United States v. Williams,* 341 U.S. 58 (1951); *United States v. Tramunti,* 500 F.2d 1334, 1346 (2nd Cir. 1974); *United States v. Gugliaro,* 501 F.2d 68, 70 (2nd Cir. 1974); *United States v. Kramer, supra,* 913.

Here, the defendant seeks to foreclose from consideration the issue of criminal intent. And while the defendant was charged in California with a violation of Title 18, United States Code, Section 472 and in New York with conspiring to violate Section 473 of that Title, the government admits that the necessary guilty knowledge or "intent to defraud", is the same under both sections. Since the defendant seeks to bar the prosecution on that issue, the burden is upon him to show that the only possible way for the California jury to acquit was to find that the defendant lacked the requisite criminal intent. *Ashe v. Swenson, supra; United States v. Tramunti, supra.* "This presents the defendant who has been acquitted in a criminal case with a most difficult burden since it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." *United States v. Gugliaro, supra,* at 70.

In order to determine whether or not the California jury acquitted based upon a finding of a lack of "intent to defraud", it is necessary to examine the California record to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson, supra,* at 444; *Sealfron v. United States,* 332 U.S. 575, 578-579 (1948).

The California jury certainly could have acquitted based upon the fact that the defendant did not have possession of the counterfeit currency. The testimony in that trial revealed that the currency was in the immediate possession of one Sam Altonian who retrieved it from a trash can behind a building wherein the defendant maintained a business. The defendant, therefore, has not met his burden.

However, even assuming that the California jury acquitted based upon a finding of a lack of criminal intent, such finding does not bar the government from proving intent to conspire between July 4, 1972 and August 2, 1972. It is certainly well within the realm of possibility that subsequent to August 2, and by August 9, 1972, the defendant abandoned his criminal scheme. Simply put, an acquittal upon one indictment is no bar to a subsequent conviction upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warant a conviction upon the other. The elements involved in the charge of possession of counterfeit currency in California on August 9, 1972 and the charge of conspiring to transfer the counterfeit currency in New York between July 4 and August 2, 1972 are far removed. See *Coy v. United States,* 5 F.2d 309 (9th Cir. 1925); *United States v. Cioffi,* 487 F.2d 492 (2nd Cir. 1973). Therefore, the California acquittal is no bar to the conspiracy conviction.

Judge MacMahon's decision is correct. Nor can it be said that there is any unfairness in bringing this second indictment against the defendant. As indicated, the government had no knowledge of the conspiracy or for that matter, the transfer of the money in New York until Gambacorta came forward to testify before the grand jury on August 8, 1973. See *United States v. Cioffi, supra,* 497; *United States v. Mallah*, 503 F.2d 971, 985 (2nd Cir. 1974).

POINT III

Defendant was not denied effective assistance of counsel.

While other circuits may have adopted different standards as pointed out by appellate counsel, the standard for determining whether or not a defendant has been denied the effective assistance of counsel is still whether the representation is so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice. *United States v. Yanishefsky,* 500 F.2d 1327, 1333 (2nd Cir. 1974); *United States v. Sanchez,* 483 F.2d 1052, 1057 (2nd Cir. 1973), *cert. denied* 415 U.S. 991 (1973); *United States v. Badalamente*, 507 F.2d 12, 21 (2nd Cir. 1974); *United States v. Ortega-Alvarez,* 506 F.2d 455, 458 (2nd Cir. 1974); *Mosher v. Lavallee*, 491 F.2d 1346 (2nd Cir. 1974), *cert. denied* 416 U.S. 906.

Here, Cala points to nine acts of commission or omission which he claims demonstrates that his trial counsel provided such ineffective representation as to require this court to reverse the conviction. Specifically, he claims that: (1) counsel was ill equipped to go forward as made apparent by his brief opening statement (Br. 10-12)[5]; (2)

[5] Reference to Appellant's Brief.

counsel failed to object to testimony relating to Gambacorta's passing of counterfeit currency on January 11, 1973 (Br. 11); (3) counsel made improper use of a prior statement and testimony of the witness, Gambacorta, in an attempt to impeach him (Br. 11-12); (4) counsel buttressed the prosecution's case on cross-examination by showing that telephone calls in fact did occur (Br. 12); (5) counsel lacked knowledge of the record keeping functions of the court (Br. 12-13); (6) counsel lacked knowledge of the penalty provisions of 18 U.S.C., Section 371 (Br. 13); (7) counsel illicited testimony detrimental to his client regarding his prior arrest and acquittal in California for a similar offense (Br. 13); (8) he failed to make a pretrial motion to dismiss the indictment based upon double jeopardy; and (9) he failed to move to dismiss at the conclusion of the government's case on the ground that the prosecution failed to make out a *prima facie* case (Br. 16).

Prior to commenting on each of the claimed instances of inadequate representation, it seems apparent from the entire record that appellate counsel is attempting to second guess strategic and tactical choices made by trial counsel. This is something appellate courts should not do. See *Moore v. United States*, 432 F.2d 730 (3rd Cir. 1970); *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C.Cir. 1973). It is also apparent from reading the record that it would appear that trial counsel's strategy was to admit that Cala was in possession of the counterfeit currency, but that his possession was strictly innocent as the acquittal in the California trial demonstrated.

Returning to the claims of ineffective representation and taking them in the order indicated, I first respectfully submit that trial counsel in his opening statement indicated that he was prepared to go forward. He knew that if

Gambacorta's testimony failed the government's case would fail. He so told the jury (A-3). Further, he apparently familiarized himself with the law of double jeopardy and *res judicata* for he so moved to dismiss the indictment on the ground that his client's criminal intent had been previously litigated thus barring his conviction here (49). He knew the element of intent was the same and differentiated between double jeopardy and collateral estoppel as a bar, a distinction which the trial court was unaware (49).

Next, Calla claims that counsel's failure to object to the testimony of Gambacorta and Secret Service Agent Robert Pochopin on Gambacorta's passing of counterfeit currency on January 11, 1973 (A-4, 23-25, 64-65) was irrelevant and highly prejudicial to him. He does not say in what way he was so prejudiced. The money passed on January 11, 1973 related to a crime committed by the co-conspirator James Gambacorta. Further, that testimony was not irrelevant. It was introduced to show that the money seized from Cala in California on August 9, 1972 was the same money given to him by Gambacorta in Buffalo, New York in mid-July, 1972 (24, 64, 72-73). In addition, Gambacorta's testimony about his passing of the counterfeit on January 11, 1973 was the crime for which he was charged and for which he entered a plea of guilty (25). The government certainly had an obligation to make known the fact that its witness had entered a plea of guilty and was awaiting sentence at the time of his testimony.

While trial counsel may not have fully followed the technical rules with respect to impeaching the witness Gambacorta with his prior written statement or grand jury testimony, he certainly engaged in effective cross-examination in attempting to discredit the witness and show that the defendant had no intention of passing the money (26-30,

32-34, 39-42, 44-45). Cala further claims that cross-examination was improper because counsel queried Gambacorta about telephone calls made by Cala to Gambacorta between July 29 and August 2, 1972. However, upon reading the entire cross-examination of Gambacorta (26-45, 55, 57), the only question posed by counsel relating to the telephone calls is contained on page 45, lines 8 and 9 of the transcript: "Q. And he told you on the phone, 'Why did you send me this money?'" Counsel's questioning of Gambacorta regarding the quality of the paper (A-8) was to show that the paper was of such poor quality as to negate the possibility that a rational person would attempt to pass the same.

Cala next claims that his lack of effective representation was made apparent by virtue of the fact that counsel asked the court if he may see the indictment charging Gambacorta (A-9). It is unclear, however, from the record as to whether counsel was asking the court or the prosecutor for a copy of the indictment. In any event, the facts and circumstances of the crime for which Gambacorta was charged and to which he pleaded guilty were fully developed by the prosecutor and defense counsel. Cala also claims that counsel's lack of knowledge was made apparent when he stated the penalty for violation of 18 U.S.C., Section 371 to be ten years (A-10). That hardly constitutes lack of effective assistance of counsel and it can hardly be said it prejudiced the defendant. And while he may have incorrectly stated the penalty for conspiracy, he correctly stated the penalty provisions for the substantive crime (A-10).

The illicited testimony regarding Cala's prior arrest and acquittal in California for a similar offense (A-11) was part of the trial strategy. Obviously, the defendant would have been hard pressed to deny his arrest on August 9,

1972. Therefore, this writer submits that counsel, under those circumstances, chose to admit the arrest and show that his client had been acquitted. His opening statement, cross-examination of Gambacorta and Delamore are directed to that end.

Cala's final claims that counsel failed to make the proper motions to dismiss based on double jeopardy as a bar and failure to prove a *prima facie* case are without merit (A-12-13, 47-50, 79-81). Cala's claim here seems to be that counsel should have first moved to dismiss on failure of the government's proof. That hardly shows ineffective representation of counsel. Counsel's primary concern was to move to dismiss on the ground that the prior trial in California necessarily litigated in his client's favor the question of intent and he was seeking to bar the prosecution on that element. In fact, counsel correctly perceived the distinction between double jeopardy and *res judicata* as a bar (49). At the conclusion of the government's case, counsel again renewed his motion to dismiss on the ground of double jeopardy (80). Following that he moved to dismiss for failure of proof (80-81). When the jury brought in a verdict of guilty on the conspiracy count, counsel asked that the jury be polled (120) and then asked that the verdict be set aside on the ground that it was against the weight of the evidence and contrary to law (122). Under these circumstances it can hardly be said that counsel lacked the skill and knowledge to prepare and defend a criminal charge. As this court said in *United States v. Yanishefsky, supra,* at 1333, quoting *Brubaker v. Dickson,* 310 F.2d 30, 39 (9th Cir. 1972) *cert. denied,* 372 U.S. 978:

> "Errorless counsel is not required and before we can vacate a conviction there must be a 'total failure to

present the cause of the accused in any fundamental respect.' "

Looking at the record as a whole, "We cannot conclude . . . that the legal representation of the appellant was constitutionally defective." *Yanishefsky* at 1334.

Appellant's secondary request for a remand to allow the District Court to inquire into the allegations of lack of effective assistance of counsel would serve no useful purpose. Again, quoting from *Yanishefsky*, at 1334:

> "In sum, the arguments based upon a post-trial reappraisal of tactics and decisions the defense counsel might have chosen to adopt do not persuade us that the appellant can validly question [his] conviction on this ground."

Conclusion

For all the foregoing reasons, it is respectfully submitted that the Judgment of Conviction be, in all respects, affirmed.

Respectfully submitted,

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ROGER P. WILLIAMS,
Assistant United States Attorney,
of Counsel.

APPENDIX I

Indictment

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

JOSEPH CALA.

MARCH 1973 SESSION
Impaneled July 9, 1973
No. 1973 299
Vio. Title 18, United States
Code, Sections 371 & 473

COUNT I

The Grand Jury Charges:

That during approximately July and August 1972, in the Western District of New York, Joseph Cala, the defendant, and James Gambacorta, named as a co-conspirator but not a co-defendant, wilfully, knowingly and unlawfully did combine, conspire and agree together to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 473, by transferring and delivering certain counterfeited obligations or other security of the United States, with the intent that the same be used as true and genuine Federal Reserve Notes, all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the times hereinafter mentioned, the defendant and co-conspirator committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof.

1. On or about the middle of July 1972, the defendant, Joseph Cala, and co-conspirator, James Gambacorta, met at Giovanni's Lounge, Town of Tonawanda, New York and had a discussion regarding the making of counterfeit currency.

2. On or about the middle of July, 1972, at Giovanni's Lounge, Town of Tonawanda, New York, James Gambacorta, the co-conspirator, delivered to the defendant, Joseph Cala, a suitcase containing a quantity of U.S. counterfeit $10.00 currency.

3. On or about the first week of August 1972, the defendant, Joseph Cala, and the co-conspirator, James Gambacorta, had a telephone conversation regarding the counterfeit currency previously delivered to Joseph Cala.

COUNT II

The Grand Jury Further Charges:

That during approximately July of 1972, in the Western District of New York, James Gambacorta wilfully and knowingly did transfer and deliver to Joseph Cala, the defendant, approximately $200,000.00 in false and counterfeited obligations of the United States, that is, ten dollar Federal Reserve Notes, with the intent that the same be used as true and genuine Federal Reserve Notes, all in violation of Title 18, United States Code, § 473.

.....

JOHN T. ELFVIN,
United States Attorney.

A TRUE BILL:

(s) DAVID P. DUGAN,
Foreman.

APPENDIX II

Judge MacMahon's Memorandum Decision Dated January 9, 1975

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JOSEPH CALA,

Defendant.

Cr. No. 1973-299.

MACMAHON, *District Judge.**

Following a jury trial before us, sitting by designation in the Western District of New York, on November 11, 1974 defendant was convicted of conspiring with James Gambacorta, approximately during July and August 1972, in the Western District of New York, to violate 18 U.S.C. § 473 by transferring certain counterfeit obligations of the United States, "with the intent that the same be used as true and genuine Federal Reserve Notes, all in violation of Title 18, United States Code, Section 371," as charged in count one of the indictment. The jury acquitted defendant Cala on count two, which charged James Gambacorta with willfully and knowingly transferring and delivering to Joseph Cala, the defendant, approximately

* Of the United States District Court for the Southern District of New York, sitting by designation.

$200,000 in false and counterfeit obligations, with the intent that the same be used as true and genuine Federal Reserve Notes, all in violation of 18 U.S.C. § 473.

During the trial, defendant Cala moved to dismiss the indictment on the grounds of double jeopardy and collateral estoppel. The court reserved decision, and, following the jury's verdict, defendant renewed his motion for dismissal and a judgment of acquittal on the same grounds, and we again reserved decision.

It appears that on January 2, 1973, after a two-day trial in the United States District Court for the Central District of California, the jury acquitted defendant on an indictment charging that: "On or about August 9, 1972, in Los Angeles County, within the Central District of California, defendant JOSEPH JAMES CALA with intent to defraud had in his possession and custody approximately $181,750 in counterfeit $10 Federal Reserve Notes, forged and counterfeited obligations of the United States, as the defendant then and there well knew," in violation of 18 U.S.C. § 472.

The counterfeit currency involved in this case was the same counterfeit currency used against defendant in the California case, and the same Secret Service men who testified here also testified there. Defendant contends that the same elements of the crime involved here were present in the California case, "namely possession *with intent* to defraud or pass as genuine Federal Reserve notes."

The government does not quarrel that the intent to defraud required for conviction in the California case under § 472 is the same as required to convict under § 473 in

this case. Significantly, however, the jury here acquitted defendant of the substantive violation of § 473.

It should also be noted that defendant was charged in California with possession of the counterfeit notes with the requisite intent on August 9, 1972, whereas here, under count one, defendant was charged under the general conspiracy statute, 18 U.S.C. § 371, with conspiracy to violate 18 U.S.C. § 473, and the purpose and period of the conspiracy charged in count one was to pass the counterfeit obligations between July 1972 and the first week of August 1972, a span of time later limited by a bill of particulars to a period between July 4, 1972 and August 2, 1972.

We have examined the entire testimony given upon the California trial, which all revolved around the possession of counterfeit currency on August 9, 1972, whereas, in this case, the testimony centered around a conspiratorial agreement to transfer and deliver the same counterfeit currency between about July 4, 1972 and August 2, 1972. In the California case, defendant testified that the package containing the counterfeit currency was delivered to him by Greyhound bus and that he had no prior knowledge of the counterfeit bills or even of the source of the package.

The government witnesses at the California trial were special agents of the Secret Service, James Delamore and Joseph Carlin, and an individual, Samuel Altonian, who took some bundles of the counterfeit currency from a trash can in back of defendant's store and was present at the time the currency was seized from defendant on August 9, 1972. The principal evidence here was the testimony of the co-conspirator, James Gambacorta, who testified to

entering into the conspiratorial agreement with defendant during meetings in Tonawanda, New York, and he further identified the counterfeit currency as being the currency delivered on or about the middle of July 1972.

In order to support a claim of double jeopardy, it must be shown that the offenses charged were in law and fact the same offenses. *United States v. McCall,* 489 F.2d 359, 362 (2d Cir. 1973), and cases there cited. Here, the two indictments not only charged violations of different statutes but were also based on different criminal transactions at different times.

The gist of the conspiracy here was an unlawful agreement between defendant and James Gambacorta. That agreement was not an element required to be proved to convict defendant on the California substantive charge of possession of counterfeit currency. Nor does it appear that it was in fact a part of the proof. Indeed, James Gambacorta was not even arrested until January 11, 1973 and did not confess to the conspiracy until August 8, 1973, more than eight months after defendant's acquittal in California. It would thus appear that at the time of the California trial, the facts of the conspiracy were not even known.

Accordingly, trial of the defendant on the instant indictment did not place him in double jeopardy because of his prior acquittal on the California indictment.

We turn then to defendant's contention that the principles of *res judicata* or collateral estoppel bar defendant's conviction on the conspiracy charged here.

Appendix II—Judge MacMahon's Memorandum Decision Dated January 9, 1975

Defendant argues that acquittal in the California case establishes that the jury there found that the defendant did not have the "intent to defraud" required by 18 U.S.C. § 472 and that an identical intent is an essential element to convict on the conspiracy charged in this case.

There can be no question that the "double jeopardy clause of the fifth amendment includes within its doctrinal scope the principle of collateral estoppel. Thus, a defendant in a criminal case cannot be convicted on the basis of an issue of ultimate fact which has been determined in the defendant's favor in a prior criminal proceeding involving the same parties." *United States v. Tramunti,* 500 F.2d 1334, 1346 (2d Cir. 1974); *Ashe v. Swenson,* 397 U.S. 436 (1970); *United States v. Williams,* 341 U.S. 58 (1951).

Since a general verdict was reached in the California case, we must examine the record, pleadings, evidence, charge and other pertinent matter in the prior case in order to determine "'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe v. Swenson, supra,* 397 U.S. at 444. In order to establish that prosecution here is barred by the California case, the burden is on defendant to show that the verdict there necessarily decided the issues in litigation here, a burden which is exceedingly difficult, to say the least, since it is usually impossible to determine the precise basis for a jury's general verdict in a criminal case. *United States v. Tramunti, supra,* 500 F.2d at 1346. Defendant has failed to sustain his burden here.

Appendix II—Judge MacMahon's Memorandum Decision Dated January 9, 1975

Defendant's argument that the jury's acquittal upon the trial of the California indictment necessarily decided that defendant lacked the requisite criminal intent involved here is without merit. The charge of possession of counterfeit currency in California on August 9, 1972 is clearly different from the charge of conspiring to transfer counterfeit currency in the Western District of New York between July 4, 1972 and August 2, 1972. Thus, the issues in the California case were not identical to the issues here with respect to the conspiracy count. Moreover, the elements of the substantive crime charged in California are different from the elements of the conspiracy charged in count one of the instant indictment. See *Coy v. United States,* 5 F.2d 309 (9th Cir. 1925). We have no difficulty, therefore, in concluding that a rational jury in the California case could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

Accordingly, defendant's motion to dismiss the indictment and for a judgment of acquittal is in all respects denied and the jury's verdict will stand.

So ordered.

Dated: Buffalo, N. Y.,
January 9, 1975.

LLOYD F. MacMAHON,
LLOYD F. MacMAHON,
United States District Judge.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Joseph Cala
Docket No. 75-1043

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 20 day of May, 1975 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

David Gerald Jay, Esq.
1730 Liberty Bank Building
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Roger P. Williams, Assistant U. S. Attorney
502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

20 day of May, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19...7>